No. 10313

# In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

NORTH AMERICAN AVIATION, INC., RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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## AUTHORITIES CITED

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### JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151, *et seq.*).[1] The jurisdiction of this Court is based upon Section 10 (e) of the Act. Respondent, a Delaware corporation, transacts business at Inglewood, County of Los Angeles, California, where the unfair labor practices occurred.

[1] Pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 31–33.

## STATEMENT OF THE CASE

Upon an amended charge duly filed by United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887, C. I. O. (herein called the Union), and following the usual proceedings pursuant to Section 10 of the Act, the Board, on September 29, 1942, issued its findings of fact, conclusions of law, and order (R. 47–70; 44 N. L. R. B., No. 113), which may be briefly summarized as follows:

1. *Nature of respondent's business* (R. 52–53).—Respondent owns and operates at Inglewood, California, a plant for the manufacture of aircraft and aircraft parts and accessories. During 1941, respondent purchased raw materials valued at more than $17,000,000, and sold aircraft and aircraft parts and accessories produced by it, valued at more than $69,500,000. Of these, raw materials valued at more than $15,300,000 and finished products valued in excess of $62,550,000, moved in interstate commerce to and from respondent's plant.[2]

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[2] Upon these findings, based upon a stipulation of counsel, the Board's jurisdiction is clear, as respondent concedes (R. 27–28). *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases. Respondent contended before the Board that the Board nevertheless "cannot" find that respondent violated the Act, because a current contract between respondent and the Union prohibited strikes or lock-outs during its term (Resp. brief to Board, pp. 25–28). Accordingly, respondent argued, the unfair labor practices alleged in the complaint to have been committed by it, could not be said to lead or tend to lead to labor disputes burdening or obstructing commerce or the free flow of commerce, within the meaning of the Act (Sections 2 (7) and 10 (a)). The contention is without merit, as the Board found (R. 50, note).

That the unfair labor practices involved in the instant case, like

2. *Respondent's unfair labor practices* (R. 53–65).— During the term of a collective bargaining agreement between respondent and the Union, in which the Union was recognized as the exclusive collective bargaining representative of the employees and which contained a provision establishing a procedure for settlement of grievances, respondent, without consultation with the Union, issued a notice to its employees, suggesting that it was "company policy" to settle grievances directly with employees individually, and establishing a separate procedure (which respondent thereafter put into operation over the Union's protests) for the disposition of grievances thus presented. Respondent thereby refused to bargain collectively with the Union as the exclusive representative of the employees, with-

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the others defined in the Act, are prolific causes of industrial strife which traditionally tends to cripple and halt the business operations of the employer involved, is a matter settled by the Congressional findings enunciated in Section 1 of the Act, and not open to challenge. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42, 43. Under the Act, the Board is given "exclusive" power to prevent such unfair labor practices, and it is explicitly provided that this power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement * * * or otherwise" (Section 10 (a)). Accordingly, it is clear that the agreement between respondent and the Union in the instant case, purporting to prevent all obstructions to commerce, cannot "affect" the Board's power to prevent obstructions which, as Congress found, traditionally result from the practices proscribed by the Act. Cf. *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. (2d) 266 (C. C. A. 3), cert. den., 314 U. S. 693. Moreover, the contention erroneously assumes, contrary to general experience, that the agreement between respondent and the Union is a guarantee against interruptions to commerce, merely because that is its objective. See, e. g., *N. L. R. B.* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 222 (C. C. A. 1).

in the meaning of Section 8 (5) of the Act, and interfered with, restrained, and coerced its employees in the exercise of their right to self-organization and to bargain collectively, in violation of Section 8 (1) of the Act.

3. *The Board's order* (R. 68–70).—The Board ordered respondent to cease and desist from its unfair labor practices; upon request, to bargain collectively with the Union as the exclusive representative; to inform the employees that the notice above-described is null and void and that respondent will give no effect to the grievance procedure established therein; and to post and maintain appropriate notices of compliance with the Board's order.

## SUMMARY OF ARGUMENT

I. Upon the undisputed facts respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act.

II. The Board's order is wholly valid and proper under the Act.

## ARGUMENT

### Point I

**Upon the undisputed facts respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act**

The facts in this case are substantially undisputed. The sole question is whether the Board's conclusion from these facts, that respondent had violated Section

8 (1) and (5) of the Act, is permissible. We shall first set out the pertinent facts found by the Board and shown by the record, and then demonstrate that upon these facts, the Board's conclusion as to respondent's unfair labor practices is proper.

### A. The undisputed facts

On July 18, 1941, following certification of the Union by the Board as the exclusive collective bargaining representative of all of respondent's employees in an appropriate unit (29 N. L. R. B. 148; 30 N. L. R. B. 1196), respondent and the Union entered into a collective bargaining agreement.[3] In the agreement, respondent recognized the Union as the exclusive bargaining agent of all of the employees in the appropriate unit, and the Union was explicitly described therein as "acting for and on behalf of" all such employees (R. 6, 8). The contract contained provisions covering wages, hours, seniority, vacations, safety conditions, use of bulletin boards, and other matters normally the subject of collective bargaining agreements, including a grievance procedure and provision for arbitration.

The article concerning grievance procedure provided, in pertinent part, as follows (R. 11–15):

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[3] The Board's certification and the contract are in the name of a predecessor local of the Union, but no question is raised as to the Union's right of successorship (R. 90–91). Nor is there any issue as to the propriety of the Board's certification and the Union's continuing majority status in the unit, which consists, generally, of all production and maintenance workers with certain exceptions.

## Article V

### Grievance Procedure

(1) In the event of any dispute arising regarding the interpretation or application of any of the terms of this agreement or any other request or grievance there shall be no stoppage of work by any employee, and all such matters shall be adjusted according to the following procedure:

(a) Between the aggrieved employee and his foreman or with his representative and his foreman.

(b) Between the district steward and the factory manager or his authorized representative.

(c) Between the plant grievance committee of the shift and the works manager or his authorized representative on that shift.

* * * * *

(3) If any case is not satisfactorily adjusted by the plant grievance committee on the shift on which the grievance arose, with the management's representative of that shift, it may be appealed to the general manager or his authorized representative, and the grievance committee, within forty-eight (48) hours of such written appeal. The general manager or his representative will render his decision in writing to the chairman of the grievance committee within forty-eight (48) hours after the meeting with the committee if the decision was not given at the meeting.

* * * * *

(10) No provision of this Article shall be interpreted to prevent any employees or group of

employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.[4]

The article concerning arbitration provided, in part, as follows (R. 15–18):

ARTICLE VI

Board of Arbitration

(1) If a grievance or dispute with respect to the interpretation or application of any of the terms of this Agreement is not satisfactorily settled, either party to this contract shall request that the matter be submitted for settlement to arbitration. If such request is made, the other party shall also agree to submit the matter to arbitration, and it is understood and agreed that the decision of the Arbitration Board, as provided for in this Article, shall be final and binding upon both parties, and therefore it is agreed that during the term of this Agreement the Union or its members shall not call or engage in, sanction, or assist in, any sympathy or other strike against, or any slowdown or stoppage of work, of the Company,

[4] Other subdivisions of the article relate to various details of the grievance procedure, not relevant to the issues in the case. Section 9 (a) of the Act provides that:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

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and the Union will require its members to perform their services for the Company when required by the Company to do so, and during the term of this Agreement the Company shall not cause or permit any lockout of the members of the Union.

* * * * *

(4) No grievance or dispute shall be presented for arbitration until either the Company or the Union has availed itself of the full procedure set forth in Article V hereof and all grievances or disputes shall be considered finally settled and not subject to arbitration unless within fifteen (15) working days from the date of receipt by the Union of the decision of the management as specified in Article V, subsection 3, the Union shall request in writing that the grievance or dispute be submitted to arbitration.

On August 12, 1941, less than a month after the signing of the agreement, and before the grievance procedure provided in the collective bargaining agreement had been put into operation,[5] respondent distributed to each of its employees in the unit covered by the contract, a copy of the agreement and also a copy of a notice, suggesting that it was "company policy" to deal with the employees directly, and announcing a separate grievance procedure by which employees could present grievances individually (R. 103, 124, 135). This notice was as follows (R. 21–22):

[5] The plant had not yet been divided into the various districts required under the grievance procedure (R. 135–136).

## Information for Employees

### GRIEVANCE PROCEDURE

In accordance with the National Labor Relations Act and the policy of North American Aviation, Inc., every employee has the privilege of presenting his grievance directly to the Management.

In order that this procedure may be known to employees, the following steps are outlined:

1. Employees must first take up the matter with their Foreman. If a satisfactory settlement is not reached, the employee may request the presence of a member of the Industrial Relations Department who will help in attempting to adjust the matter.

2. If the complaint is not adjusted satisfactorily, a member of the Industrial Relations Department will arrange a hearing with the Works Manager or his representative.

3. Should the decision of the Works Manager not be satisfactory to the employee, he may, if he so desires, present a written appeal to the President of the Company. The Industrial Relations Department will assist the employee in arranging for the presentation of his case.

4. Should the decision of the President not be satisfactory, and the employee so desires, the matter may be submitted to outside arbitration in a manner mutually acceptable to both the employee and the Company.

The Industrial Relations Staff is available to all employees who may desire information or assistance with respect to their rights or

> privileges under either *company policy* [italics supplied] or collective bargaining. Employees desiring to contact the Industrial Relations Department may call at the following hours Monday through Friday:
>
> First Shift—At the conclusion of the shift.
> Second Shift—Before shift starts work.
> Third Shift—Third shift employees shall ask their Foreman to make arrangements for an appointment. Such matters will receive prompt attention.
>
> NORTH AMERICAN AVIATION, INC.
> J. H. KINDELBERGER, *President.*

The notice was promulgated and distributed without prior notice to or consultation with the Union (R. 118, 124). Since August 12, respondent has continued to distribute such notices and copies of the trade agreement to all new employees, despite the Union's protests (R. 147). Respondent had never previously issued notices to its employees advising them of any formal procedure for the presentation of individual grievances (R. 143).

Following the distribution of the notices, the procedure therein outlined was put into operation at respondent's plant, and, in at least two instances, has actually been invoked by individual employees in the appropriate unit (R. 146–147).[6] Respondent's per-

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[6] Despite respondent's establishment of the separate procedure, an overwhelming number of the employees nevertheless used the grievance machinery established by the trade agreement (R. 146–147). The circumstance that respondent's conduct thus did not succeed in luring more than very few of the employees from use of the collective bargaining machinery does not, of course, affect its illegality under the Act. Cf., e. g., *N. L. R. B.* v. *Link-*

sonnel director testified that the employees have not been notified of any limitation upon the nature or type of grievances that might be submitted under the individual grievance procedure, and, further, that "there would be no limitation on discussing with the employee what he might want to discuss" (R. 137–138). While he also testified that, "obviously, there would be limitations on what we might arrive at" (*ibid.*), he did not state what these "limitations" might be, and so far as appears from the record, limitations were never formulated.[7]

**B. Upon these facts, the Board properly found that respondent violated Section 8 (1) and (5) of the Act**

Upon the foregoing facts, the Board found that respondent, "by the issuance of the notice of August 12, 1941, and by the establishment of the grievance procedure described therein," refused to bargain collectively with the Union as the exclusive representative of the employees, and interfered with, restrained,

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*Belt Co.*, 311 U. S. 584, 588; *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951, 956 (C. C. A. 4); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. (2d) 452, 457 (C. C. A. 7), cert. den., 63 S. Ct. 45; *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. (2d) 641, 653 (App. D. C.).

[7] On February 16, 1942, after the Union had filed charges with the Board, respondent, again without notice to or consultation with the Union, promulgated further notices which modified in certain respects the language of the statement of August 12 and provided a substitute procedure for presenting individual grievances (R. 109–118). These notices, however, were never distributed to the employees, as respondent claimed, because the Board issued its complaint herein, and the new procedure was never put into effect (R. 107–108). Accordingly, the legality of respondent's conduct must be determined by the August 12 notice, which is the only one in operation so far as the employees are aware.

and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices in violation of Section 8 (1) and (5) of the Act (R. 65). The sole issue is whether, as the Board found (R. 59–65), after a grievance procedure had been established by agreement between respondent and the Union as the exclusive collective bargaining representative of all the employees, respondent was not free unilaterally to establish, as it did, a separate grievance procedure for the adjustment of grievances presented individually by the employees; or whether, as respondent contends, the proviso to Section 9 (a), which states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer,"[8] impliedly carries with it the right of an employer unilaterally to establish such separate grievance procedure.

We submit that the Board's holding is not only proper but necessary to effectuation of the Act's purposes, and that the construction of the proviso for which respondent contends seriously subtracts from the exclusive bargaining agent's representative rights, opens the door to individual bargaining and duality of representation, and undermines the entire process of collective bargaining, contrary to the Act's stated purpose to encourage "the practice and procedure" of collective bargaining (Section 1). Congress did not provide in the statute so facile a means for defeating it.

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[8] Section 9 (a) is quoted in full *supra*, note 4, p. 7. There is no claim that respondent's activities are otherwise permissible under the statute.

### 1. *A grievance procedure is an appropriate subject of collective bargaining*

As the Board stated (R. 61–62), "a collective contract is not complete as originally negotiated, nor is the process of collective bargaining complete upon the execution of a contract." To the contrary, the collective bargaining process is a continuing one, involving not only the consummation of collective contracts but their application and interpretation.[9] In this continuing process, the initial contract has aptly been described as merely the "general constitution upon which a body of industrial law is built." "The rules and regulations first set forth in the contract are elaborated and changed" in day to day application of the agreement, thus gradually evolving "into a body of industrial common law * * *."[10] This interpretation and application of the contract are, of course, also essential parts of the collective bargaining process.[11]

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[9] See, e. g., *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *Rapid Roller Co.* v. *N. L. R. B.* 126 F. (2d) 452, 459 (C. C. A. 7), cert. den. 63 S. Ct. 45; *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. (2d) 266, 267 (C. C. A. 3), cert. den., 314 U. S. 693.

[10] Clinton S. Golden and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy*, p. 43.

[11] See, e. g., Carroll R. Daugherty, *Labor Problems in American Industry*, 1938 (Revised Edition) :

"* * * Collective bargaining is the process whereby representatives of a union meet with an employer or representatives of an employers' association to fix the terms of employment for a certain period of time. But it includes more than the creation of an agreement. There is more to it than the negotiations lasting a week or so. It involves also the enforcement and interpretation of the agreement throughout the months of its duration" [p. 450].

"The interpretation of the various detailed terms of the em-

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The grievance procedure established in the collective bargaining agreement is in a sense the judicial system by which normally this process of application and interpretation is carried on, since disputes regarding the meaning and application of the contract ordinarily arise as grievances and are therefore normally determined through recourse to the grievance procedure.[12] The agreement in the instant case ex-

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ployment contract is one of the most important parts of collective bargaining. It is essentially a judicial function and involves the application of the agreement to various questions and points that come up during the year" [p. 452].

Clinton S. Golden and Harold J. Ruttenberg, *The Dynamics of Industrial Democracy:*

"The written contract is a general constitution upon which a body of industrial law is built. The rules and regulations first set forth in the contract are elaborated and changed from day to day in the settlement of grievances and the interpretation of the contract. Gradually they evolve into a body of industrial common law, developed in a democratic manner" [p. 43].

[12] Watkins and Dodd, *The Management of Labor Relations,* 1938 (1st Edition):

"Although many trade agreements, like that covering the West-Coast maritime industry, provide for arbitration by an impartial arbiter or tribunal, the tendency is to use every possible means in adjusting grievances before they develop into major issues necessitating arbitration. In this regard, the shop committees, work councils, or business agents perform a valuable service. They assure early hearing and immediate attempts at adjustment. Because these committees or representatives are usually given rather broad powers of interpretation and execution of trade agreements, they constitute an important unit in the scheme of union-management cooperation and industrial peace" [p. 709].

See also The Twentieth Century Fund, *How Collective Bargaining Works* (1942), a description of bargaining in various industries, at pages 51, 244, 314, 360, 362, 418, 566, 596, 644, 652, 736, 801, and 858.

plicitly recognizes this fact; it provides for invocation of the grievance procedure "in the event of any dispute arising regarding the interpretation or application" of any term of the contract (*supra.*, p. 6). Indeed, the collective contract, in practice, attains its highest utility in realizing the purposes of the Act to substitute peaceful adjustment of labor disputes for strikes and industrial warfare, through the establishment and operation of the grievance procedure. Moreover, it is through successful handling of grievances, i. e., successful advocacy in the tribunals established by the grievance procedure, that labor unions frequently continue to demonstrate their efficacy to employees.

It is thus apparent that employees and their labor organizations have a vital interest in the establishment and operation of a grievance procedure. This interest is as real as is the concern of society generally with the kind of judicial system under which it functions; in each case, the nature of the system bears importantly upon those who resort to it rather than to force, when they feel injured. Indeed, the employees' concern with a grievance procedure may be as intense as is their concern with wages, hours, seniority, and other conditions of their employment, for a voice in the determination of which workers traditionally act in concert through labor unions, since the disposition of grievances, of course, necessarily requires the interpretation and application of the other substantive provisions of the collective contract.

Accordingly, it seems too plain for argument that a grievance procedure is a normal and proper subject

of collective bargaining. The Act on its face shows the Congressional awareness of this truism: if it were not so, the proviso to Section 9 (a) would have been unnecessary since employees would have been free in any event to deal individually with the employer regarding grievances even though an exclusive representative has been selected to deal on their behalf regarding wages, hours, and conditions of employment. And respondent in the instant case has in effect recognized this fact by bargaining with the Union concerning a grievance procedure and by including a provision covering the subject in its collective contract with that organization. Of course, the provisions of the collective contract establishing a grievance procedure, like the provisions covering any other appropriate subjects of collective bargaining, extend to *all* of the employees in the bargaining unit.

It is well settled that an employer may not, after the employees have selected a collective bargaining representative, insist upon the right to deal unilaterally with respect to matters which are appropriate subjects of collective bargaining. Such conduct in effect removes from the collective bargaining area matters as to which employees have a right to deal collectively with the employer, and constitutes a repudiation of the collective bargaining principle, in violation of Section 8 (1) and (5) of the Act. See, e. g., *Singer Mfg. Co.* v. *N. L. R. B.*, 119 F. (2d) 131, 136, 137–138 (C. C. A. 7), cert. den. 313 U. S. 595; *Great Southern Trucking Co.* v. *N. L. R. B.*, 127 F. (2d) 180, 186 (C. C. A. 4), cert. den. 63 S. Ct. 48·

*Inland Lime and Stone Co.* v. *N. L. R. B.*, 119 F. (2d) 20, 22 (C. C. A. 7); *N. L. R. B.* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478–479 (C. C. A. 5); *N. L. R. B.* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *N. L. R. B.* v. *George P. Pilling & Co.*, 119 F. (2d) 32, 36 (C. C. A. 3). This is, however, what respondent has done in the instant case, with respect to establishment of a grievance procedure.

2. *The proviso to Section 9 (a) of the Act does not sanction unilateral establishment of a separate grievance procedure for presentation of individual grievances, after a grievance procedure has been agreed upon with the exclusive representative of the employees*

Respondent contends that its right to establish unilaterally a separate grievance procedure for the settlement of grievances presented individually by its employees is implied in the proviso to Section 9 (a) of the Act. But the proviso, as is clear from its face, grants employees a choice to present their grievances individually or in groups despite their selection of an exclusive collective bargaining representative; it does not grant to an *employer* the right to deal *unilaterally* with regard to establishment of a grievance procedure. The proviso merely grants employees the right as litigants to employ *in personas* the grievance (i. e., judicial) procedure which the industrial constitution under which they work (and which through their labor union they had a voice in promulgating) establishes for adjustment of disputes. Respondent's contention that the reservation of this

right to litigate impliedly carries with it the right of an employer to establish unilaterally a separate judicial process in which to litigate, is plainly a *non sequitur,* and proceeds from a confusion of these entirely different elements. Obviously, the right to present grievances, the only right reserved by the proviso, has no necessary connection with the establishment or the nature of the procedure pursuant to which the right is exercised. Nothing in the language of the Act or its history suggests that Congress intended to exclude from the area of collective bargaining the establishment of a *grievance procedure.* To the contrary, as stated above, the fact that Congress added the proviso to Section 9 (a), giving individual employees the right to *present* grievances, suggests that Congress intended to leave establishment of a grievance procedure where it found it, i. e., an appropriate subject of collective bargaining with the exclusive representative.[3]

3. *The grievance procedure unilaterally established by respondent in the instant case, by its terms also violates the Act*

We submit that the considerations discussed in sections 1 and 2, *supra,* in and of themselves require

[3] Respondent contends that its right to establish a separate grievance procedure for individual grievances is necessary to orderly and uniform presentation of such matters, and to proper management of its plant. But the Board's construction of the proviso insures such orderliness and uniformity; it requires the parties to use the single system established by agreement between the employer and the representative, except that employees are free to appear in person and without the representative, at each stage of the process.

enforcement of the Board's order herein. However, without regard to the foregoing considerations, we submit further that respondent's conduct with respect to the grievance procedure unilaterally established in the instant case also violates the Act in other respects.

*a. Respondent's separate grievance procedure creates a dual representative of the employees, contrary to the majority rule principle of Section 9 (a)*

Section 9 (a) of the Act provides that the representatives selected for purposes of collective bargaining by the majority of the employees "shall be the exclusive representatives of all the employees" for the purposes of collective bargaining in respect to wages, hours, and other conditions of employment. In the instant case, respondent, as part of the separate grievance procedure which it unilaterally established for individual employees, has designated its industrial relations staff to assist employees in presenting grievances and to "help in attempting to adjust" them (R. 21–22). Thus, respondent has in effect made its industrial relations staff an employees' representative in connection with presenting and adjusting disputes which, as we have demonstrated, normally include questions as to wages, hours, and other conditions of employment, and necessarily require the interpretation of substantive provisions of the collective contract. Accordingly, respondent's conduct creates a dual agent for representation of the employees in dealing with the employer concerning these appropriate subjects of collective bargaining, contrary to the express provision of Section 9 (a) that the majority representative shall be the "exclusive" agent of the

employees for purposes of bargaining with the employer with regard to such matters.

The proviso of Section 9 (a) gives no sanction to respondent's conduct; the proviso on its face reserves the right to "any individual employee or a group of employees" to present grievances to the employer; it does not provide that a *representative* other than the exclusive representative may do so. And it is clear from the legislative history that the proviso was intended to exclude any representative for presentation of grievances, other than the exclusive representative. In its draft form before the appropriate Senate and House Committees, the proviso expressly provided that "any individual employee or group of employees" should have the right to present grievances to the employer "through representatives of their own choosing." After criticism of the language of the draft as appearing to permit the employer to "build up another company union," the words permitting representation were stricken from the bill.[14]

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[14] The following colloquy occurred during the House hearings on the bill (see H. R. Report No. 1147, pages 1, 3), which was the predecessor of the Act (Hearings, House of Representatives, Committee on Labor, 74th Cong., 1st Sess., H. R. 6288, p. 301):

"The CHAIRMAN. On page 10, line 1, it provides—

" 'That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing.

"That looks to me as if the employer could build up another company union.

"Secretary PERKINS. I have proposed an amendment that would make that language read—

" 'That nothing in this section shall deprive any individual employee or group of employees of the right at any time to present grievances to their employer.'

"The CHAIRMAN. Do you think that your proposed amendment

It is thus clear, we submit, that respondent's conduct in the instant case in establishing a dual representative of the employees is directly contrary to the intention of Congress, and constitutes in effect a denial of recognition to the majority representative, as the exclusive representative. Such denial is, of course, a clear violation of Section 8 (5) and (1) of the Act. See e. g., *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 358; *N. L. R. B.* v. *Griswold Mfg. Co.,* 106 F. (2d) 713, 719–720–721 (C. C. A. 3); *McQuay-Norris Mfg. Co.* v. *N. L. R. B.,* 116 F. (2d) 748, 751 (C. C. A. 7), cert. denied 313 U. S. 565.

*b. Respondent's separate grievance procedure also unlawfully permits individual bargaining after a collective bargaining representative has been selected*

As we have pointed out (*supra,* pp. 9–11), so far as the record discloses, there are no limitations upon the nature or type of grievances which may be submitted by individual employees under respondent's separate grievance procedure, nor are there any limitations upon the manner in which such grievances may be disposed of by respondent dealing directly

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would take care of that?

"Secretary PERKINS. Yes; that is our judgment.

"The CHAIRMAN. In other words, your understanding is that if a majority of the plant employees decide to form a union and they were the ones to do the collective bargaining—suppose there was a minority of 40 percent and they went to the employer and presented their grievance, the collective-bargaining proposition would still have to be taken care of by the majority?

"Secretary PERKINS. That is my understanding."

See also Hearings, Senate Committee on Education and Labor, 74th Cong., 1st Sess., S. 1958, p. 69.

with the individual employees or by an arbitrator agreed upon by respondent and the individual employees. Thus, so far as appears, under its separate grievance procedure respondent may, despite the designation of an exclusive representative, deal directly with individual employees in disposing of grievances which, as we have indicated, necessarily require interpretation and application of the collective contract which fixes the wages, hours, and conditions of employment of *all* employees.

But, as has been demonstrated, the collective bargaining process is not complete upon negotiation of a collective contract; the interpretation and application of the contract to daily problems also constitute an integral part of the collective bargaining process. These questions of application and interpretation are normally determined through recourse to the grievance procedure, since disputes regarding the meaning or application of the contract ordinarily arise as grievances. While individuals may present grievances, the collective bargaining agent is, of course, the exclusive representative for purposes of dealing with the employer concerning these matters of interpretation, necessarily required in disposing of the grievances, as well as concerning the initial promulgation of the agreement. *N. L. R. B.* v. *Sands Mfg. Co.,* 306 U. S. 332, 342; *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. (2d) 452, 459 (C. C. A. 7), cert. den. 63 S. Ct. 45.[15] And, as the Board pointed out (R. 62–63), whether grievances

[15] See note 16, below.

are presented to the employer by the collective bargaining representative or by individual employees, they must necessarily be settled not only in accordance with the contract provisions, but equally necessarily, in accordance with all the precedents and interpretations of the contract between the employer and the exclusive bargaining representative by which the terms of employment of *all* the employees are established.[16]

It is thus apparent that respondent's grievance procedure permits individual bargaining as to wages, hours, and conditions of employment, after an exclusive representative has been selected, and denies to the exclusive representative the right to establish by collective bargaining the terms and conditions of employment of all employees in the appropriate unit. This is the very antithesis of sound collective bargaining, which it is the basic policy of the Act to encourage, and conflicts squarely with the principle of majority rule which Congress deliberately embodied in Section

[16] We do not mean to suggest an employer may not act upon grievances individually presented by the employees. On the contrary, the Board expressly declared that the right of employees to present grievances implied the right of the employer "to receive and act upon" them (R. 60). But the grievances, whether presented individually or by the collective bargaining representative, must be settled, as the Board stated (R. 62–63), "in accordance with the provisions and interpretation of the contract between the employer and the exclusive bargaining representative by which the terms of employment of all the employees are established." In the instant case, however, respondent's notice to the employees permits disposition of grievances, even though involving interpretation of the collective contract, by respondent unilaterally or by an arbitrator selected by respondent and the individual employee, without regard to the exclusive bargaining agent.

9 (a) of the Act.[17] Clearly, one of the major purposes of Congress in adopting this principle was to foreclose employers from bargaining with individuals and minority groups after a majority had selected a representative.[18]

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[17] Sen. Rept. No. 573, 74th Cong., 1st Sess., p. 13, states with reference to the principle of majority rule:

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions."

The House Report is similar in tenor. (See House Rept. No. 1147, 74th Cong., 1st Sess., pp. 20–21.) Obviously, respondent, in arguing in effect for individual bargaining for each of its employees, is contending for the ultimate in the division of employees among themselves, against which Congress sought to guard in adopting the majority rule.

[18] See, e. g., *Humble Oil & Refining Co.* v. *N. L. R. B.*, 113 F. (2d) 85, 87 (C. C. A. 5), in which the Court declared that—

"So long as a majority of the employees in each plant freely choose to belong to or be represented by the Federations they are the bargaining representatives and the contracts they make cannot be ignored. *Minority groups may separately present their grievances, but must submit to bargain through the majority representatives.*" [Italics added];

and *N. L. R. B.* v. *Knoxville Publishing Co.*, 124 F. (2d) 875,

The Congressional history of the Act confirms this proper view. In reporting the bill which became the Act, the Senate Committee on Education and Labor, referring to Section 9 (a), stated:

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives *by bargaining with individuals or minority groups in their own behalf,* after representatives have been picked by the majority to represent all [S. Rept. No. 573, 74th Cong., 1st Sess., p 13]. [italics added.]

The Report of the House Committee on Labor is equally clear. It stated:

> Section 9 (a) incorporates the majority rule principle, that representatives designated for the purposes of collective bargaining by the majority of employees in the appropriate unit shall be the exclusive representatives of all the employees in that unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other condi-

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881–882 (C. C. A. 6), where the Court stated:

"The intent of the Act was to permit an employee to surrender to a collective agent his individual right to bargain with an employer, after which he no longer possesses this right during the life of the contract and the statute requires the employer to deal exclusively with the agent of his employees if one has been selected as provided."

See, also, cases cited note 19, below.

> tions of employment." As a necessary corollary it is an act of interference (under sec. 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining [H. Rept. No. 1147, 74th Cong., 1st Sess., p. 20].
>
> * * * * *
>
> Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. And they are given added protection in various respects. First, the proviso to Section 9 (a) expressly stated that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer." And the majority rule does not preclude adjustment in individual cases of matters outside the scope of the basic agreement. Second, agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to "encourage or discourage membership in any labor organization" [*Ibid.* p. 21].[19]

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[19] Cf., also, *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 360–361; *N. L. R. B.* v. *Stone, et al.*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. den. 63 S. Ct. 44; *N. L. R. B.* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420 (C. C. A. 2); *N. L. R. B.* v. *Superior Tanning Co.*, 117 F. (2d) 881, 891–892 (C. C. A. 7), cert. den. 313 U. S. 559.

*N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9), is not to the contrary. In that case, as this Court noted, the union involved had acquiesced in direct settlement of a grievance. The Court declared that the Act "does not inhibit adjustment of individual grievances directly between employee and employer

It may not be said that Congress intended the proviso to read into Section 9 (a) a wide door to defeat the clear Congressional intent in enacting that section.[20]

*c. Respondent's conduct in the instant case unlawfully discourages the employees from utilizing the collective bargaining procedure for disposing of grievances*

Finally, there is another vice in respondent's conduct in the instant case. Respondent's notice to the employees describes the grievance procedure unilaterally established by respondent as "company policy," in contradistinction to "collective bargaining" (R. 22). As the Board pointed out (R. 64), respondent thus is implicitly expressing its preference for that procedure rather than for collective bargaining and is inviting the employees to use it rather than the contract procedure. Moreover, respondent is in effect suggesting that the employees may secure benefits

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and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class" (99 F. (2d) at 164). As we have shown (pp. 13–16), a grievance procedure is a subject of collective bargaining which obviously affects the employees "as a class' in a vital way. Moreover, nothing in the Court's statement suggests that an employer may deal unilaterally with an individual employee concerning a matter covered by a collective bargaining contract affecting *all* of the employees. Respondent's grievance procedure in the instant case, however, permits such conduct.

[20] Cf. *N. L. R. B.* v. *Stone*, 125 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 63 S. Ct. 44, in which the Court described a provision in a contract with individual employees, providing for individual bargaining and reference of disputes to arbitration, as "the very antithesis of collective bargaining." See, also, *N. L. R. B.* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 221 (C. C. A. 1), in which the Court declared: "Clearly to bargain directly with one's employees is not to bargain with their designated exclusive representative."

under "company policy" which are different from those negotiated by the Union. Such conduct is inconsistent with good faith acceptance of the collective bargaining principle and recognition of the Union as the exclusive agent, and constitutes palpable interference with the employees' rights to bargain collectively through their chosen representative, free from the intrusion or influence of the employer.[21]

*Recapitulation*

In sum, we submit that the negotiation of a grievance procedure is a proper subject of collective bargaining, and that once a grievance procedure is established by agreement between the employer and the exclusive representative of the employees, the employer may not unilaterally establish a dual grievance procedure for presentation of grievances by individual employees. Respondent's contention that the right of an employer unilaterally to establish a dual procedure is implied in the proviso to Section 9 (a), is without merit. The proviso, as is clear from its face, merely grants individual employees the right to present grievances; it does not deal with establish-

[21] The impropriety of respondent's conduct is apparent from a consideration of perhaps less subtle action to achieve the same purpose. Thus, respondent might, for example, establish a grievance procedure for presentation of individual grievances which provided for submission of grievances directly to the highest officials of respondent and thereafter to a committee of three non-supervisory employees in the department involved. The destructive effects upon the Union's representative status which would inevitably flow from such a course require no elaboration; employees could scarcely be expected in such circumstances to use the Union as their representative.

ment of a *grievance procedure,* as respondent in effect contends. Moreover, the construction of the proviso for which respondent contends, would, as the facts of this case demonstrate, in effect destroy the statutory right of the majority representative to *exclusive* representation of *all* the employees, would permit dual representation of the employees, and would permit individual bargaining after an exclusive representative had been selected. Such results are plainly repugnant to the stated objectives of the Act to encourage the practice and procedure of collective bargaining.

## Point II

**The Board's order is wholly valid and proper under the Act**

The Board's order requires respondent to cease and desist from (1) refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit; (2) distributing copies of the notice of August 12 to the employees; (3) giving effect to the grievance procedure established in the notice; and (4) engaging in any "like or related acts or conduct" interfering with the employees' exercise of the rights guaranteed them in Section 7 of the Act (R. 68–69). The validity of these provisions upon the findings made is clear. Section 10 (c) of the Act; *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265; *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 435–437; *N. L. R. B.* v. *Grower-Shipper Vegetable Association of Central California,* 122 F. (2d) 368, 376, 377 (C. C. A. 9); cf. *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 361, 364, 367.

Equally well established is the propriety of the affirmative provisons of the Board's order. These direct respondent (1) to bargain collectively, upon request, with the Union as the exclusive representative; (2) to advise each of the employees who has received a copy of the notice of August 12, that the notice is null and void and that respondent will give no effect to the grievance procedure established therein; and (3) to post and maintain appropriate notices to the employees of compliance with the Board's order (R 69–70). E. g., *N. L. R. B.* v. *P. Lorillard Co.*, 314 U. S. 512; the *National Licorice case,* 309 U. S. 350, 367.

## CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

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FEBRUARY 1943.

Argued by Mr. Jacobson.

# APPENDIX

Pertinent provisions of the National Labor Relations Act are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
>
> SEC. 2. When used in this Act—
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> * * * * *
>
> (7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.
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> * * * * *
>
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) * * * If * * * the Board shall be of the opinion that any person * * * has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice

in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * The findings of the Board as to the facts, if supported by evidence shall be conclusive. * * *

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